BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY L. SCHRAG	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,570
WAGGONERS, INC.	)	
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the February 9, 2009, Award of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits for a 5 percent impairment to his right foot for injuries suffered on December 1, 2006. Claimant's award was calculated paying claimant at the maximum weekly benefit after the ALJ determined that claimant's average weekly wage was $914.71 for a part-time temporary worker.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Patricia A. Wohlford of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 19, 2009.

ISSUES

1. What is the nature and extent of claimant's disability? Claimant argues he has a 12 percent impairment to the right ankle (lower leg), based on the opinion of George Fluter, M.D. While respondent argues the 5 percent impairment to claimant's right foot from

claimant's treating physician, Eric L. Severud, M.D., is the most accurate rating.

2. What was claimant's pre-injury average weekly wage? Respondent argues that the entire time claimant worked for respondent should be used to calculate claimant's wage, with the result being an average weekly wage of $332.62. Claimant argues only the weeks claimant actually performed work for respondent should be used. The ALJ, using the calculation method proposed by claimant, found an average weekly wage of $914.71 and a weekly compensation rate of $483.00.

FINDINGS OF FACT

Claimant was hired as a temporary, part-time delivery driver for respondent, beginning on September 13, 2006. Claimant's duties involved delivering church pew cushions to different churches. Claimant was paid 30 cents per mile for the deliveries. Claimant would also occasionally perform labor in respondent's plant and was paid $11.00 per hour for that work. Claimant's Exhibit 1 to the regular hearing details the days claimant worked for respondent and the amounts claimant was paid for that work. Claimant's Exhibit 1 also details the work and money paid to claimant when performing services for other employers.

On December 1, 2006, while delivering for respondent, claimant suffered an injury to his right foot. Claimant came under the care of board certified orthopedic surgeon Eric L. Severud, M.D. Claimant was diagnosed with a Lisfranc dislocation fracture of his mid-foot. A Lisfranc fracture is in the middle part of the foot where the metatarsals articulate with the metatarsal bones. Surgery was performed on January 5, 2007, involving an open reduction and internal fixation of the Lisfranc dislocation. Claimant returned to surgery in April 2007, to remove the hardware, which Dr. Severud stated was standard procedure. Using the fourth edition of the AMA *Guides*,[1] Dr. Severud rated claimant at 5 percent to the right foot. Dr. Severud testified that claimant described no complaints of pain in his right ankle during the treatment provided. Although Dr. Severud did perform range of motion studies on the ankle at the April 26, 2007, visit, which may have indicated ankle complaints, the range of motion tests on the ankle were normal.

Claimant was referred by his attorney to board certified physical medicine specialist George Fluter, M.D., for an evaluation on April 7, 2008. Dr. Fluter diagnosed claimant as post-surgery for a right foot Lisfranc fracture with open reduction and internal fixation surgery. Dr. Fluter also found a possible ankle sprain as the result of the injury. However,

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Fluter agreed that claimant received no treatment for the ankle after the injury. Claimant did wear a boot on his foot which would have partially immobilized the foot and ankle. Dr. Fluter agreed with the 5 percent impairment to the right foot, but also found a 7 percent impairment to claimant's right ankle, both pursuant to the fourth edition of the AMA *Guides*.[2] These combined for a 12 percent impairment to the lower extremity. He found a mild, limited range of motion in the ankle.

Claimant's total employment with respondent went from September 13, 2006, through the week of December 4, 2006. However, claimant was hired as a part-time, temporary employee and could work for other employers if the opportunity arose. Claimant did, in fact, work for two other employers during the time he was employed by respondent. During this time, claimant worked all or a part of 10 weeks for respondent and the other employers. Respondent argues that the entire time period during which claimant was employed should be used to calculate the average weekly wage. This would result in a wage of $332.62 and a weekly compensation rate of $221.76. Claimant argues that only the days or weeks claimant actually worked for respondent should be used to calculate the wage. The ALJ, citing *Elder*,[3] determined that claimant's proposed method of calculation was the most accurate and calculated an average weekly wage of $914.71 with a weekly compensation rate limited by the maximum weekly benefit of $483.00 for claimant's date of accident. It is noted that while the ALJ used the numbers contained in claimant's Exhibit 1 from the regular hearing, the exhibit is actually slightly misleading. Claimant's Exhibit 1 shows a total of 8 days from November 27, 2006, to December 4, 2006, as claimant's last trip. However, claimant was injured on December 1, 2006. Therefore, the last trip encompassed only 5 days, rather than 8 days as shown on the exhibit, with the accident occurring on the fifth day of the trip. This reduces the total number of days claimant worked for respondent to 27 rather than 31. This encompasses all or part of 6 weeks.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

---

[2] AMA *Guides* (4th ed.).

[3] *Elder v. Arma Mobile Transit Co.*, 253 Kan. 824, 861 P.2d 822 (1993).

[4] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[7]

K.S.A. 44-510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
>
> . . .
> (14) For the loss of a foot, 125 weeks.
> (15) For the loss of a lower leg, 190 weeks.

The ALJ found the impairment opinion of Dr. Severud, the treating physician, to carry the most weight. The Board agrees. While Dr. Fluter finds limitations in claimant's ankle, the record, including the medical reports of Dr. Severud, do not support this finding.

---

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2006 Supp. 44-501(a).

[7] K.S.A. 44-510e(a).

The Board affirms the finding that claimant suffered a 5 percent functional disability to his right foot as the result of this injury. This limits claimant to 125 weeks of compensation under K.S.A. 44-510d rather than the 190 weeks of compensation that would be available if the injury were to the ankle and calculated as a lower leg impairment.

K.S.A. 2006 Supp. 511(a)(3) states:

> The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

K.S.A. 2006 Supp. 511(b)(5) states:

> If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

While claimant's employment with respondent covered a portion of four months, the actual work days only added to 27 days, not including the date of accident. During this time, claimant also worked for two other delivery services for a total of 11 working days, or all or part of 4 weeks. Claimant worked all or part of 10 weeks for all employers during this

time. Claimant earned a total of $3,658.85 from respondent and a total of $4,587.11 from all employers during this time period.

The ALJ, in calculating claimant's wage on the date of accident, cites *Elder* in support of his calculations. The Board finds the ALJ's analysis to be nearly accurate. The Kansas Supreme Court, in *Elder*, cites *Osmundson*[8] as support for the use of only the weeks during which an employee is working to calculate the wage. In *Osmundson*, the claimant was hired as a seasonal employee and worked 11 of 26 weeks for Sedan Floral, Inc. During the remaining weeks, work was not available to the claimant and the claimant was eligible for and was paid unemployment benefits. The *Elder* Court, in analyzing K.S.A. 1992 Supp. 44-511(b)(5), determined that K.S.A. 1992 Supp. 44-703(m) of the Employment Security Law statutes defined "unemployment" by stating that "[a]n individual shall be deemed 'unemployed' with respect to any week during which such individual performs no services and with respect to which no wages are payable to such individual."[9] The Court in *Elder* also cited *Zeitner*[10] as support for construing K.S.A. 1992 Supp. 44-511(b)(5) to reflect the legislative intent that the word "employed" means the time the worker is employed and on the job. The Court in *Elder* agreed that *Osmundson* was distinguishable from *Elder*, as *Osmundson* involved a seasonal employee and unemployment benefits, while *Elder* involved "leave of absence" or "vacation" time. Nevertheless, the Court in *Elder* did not include the weeks the claimant was on a leave of absence when calculating the average weekly wage.

Here, the Board finds the situation in *Osmundson* to be more in line than *Elder*. While the Court in *Elder* distinguished *Osmundson*, it did not change the Court of Appeals analysis of the proper calculation of the average weekly wage when dealing with part-time employment. Osmundson's employment was seasonal, with weeks where work was not available, even though the claimant was available to work. This situation is very similar to the present case. Here, claimant was available for work, but work was not available to him. The Court, in *Osmundson*, also citing *Zeitner*, found the legislative intent of K.S.A. 44-511(b)(5) is for the word "employed" to mean the time the worker is employed and on the job. "It does not intend for the average weekly wage computation to include time during which a worker is entitled to draw unemployment compensation and is free to seek and accept other employment until work is again available from the regular employer."[11]

---

[8] *Osmundson v. Sedan Floral, Inc.*, 10 Kan. App. 2d 261, 697 P.2d 85 (1985).

[9] *Elder* at 828.

[10] *Zeitner v. Floair, Inc.*, 211 Kan. 19, 505 P.2d 661 (1973).

[11] *Osmundson* at 265.

K.S.A. 2006 Supp. 44-511(b)(7) states:

> The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

While claimant was employed with respondent, he also had the opportunity to work for other employers, as a truck driver and delivering for those other employers. Here, claimant's jobs for the other employers were similar to the work performed for respondent. Pursuant to K.S.A. 2006 Supp. 44-511(b)(7), the income earned by claimant with the other employers will also be used to calculate the wages claimant was earning on the date of accident. The total wages earned by claimant, as listed in claimant's Exhibit 1 to the regular hearing, for all employments is $4,587.11. K.S.A. 2006 Supp. 44-511(b)(5) requires the gross amount of money earned to be averaged by the "number of calendar weeks so employed". Here, claimant was "so employed" for all or part of 10 weeks. Consequently, the Board will use 10 weeks and the gross wages listed in Exhibit 1 to the regular hearing to calculate the average weekly wage. This results in an average weekly wage of $458.71 and a maximum compensation rate of $305.82. The award of the ALJ will be adjusted accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified with regard to the calculation of claimant's average weekly wage, but affirmed with regard to the functional disability suffered by claimant as the result of this accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 9, 2009, should be, and is hereby, modified with regard to the calculation of claimant's average weekly wage, but affirmed with regard to the functional disability suffered by claimant.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jerry L. Schrag, and against the respondent, Waggoners, Inc., and its insurance carrier, Twin City Fire Insurance Company, for an accidental injury which occurred December 1, 2006, and based upon an average weekly wage of $458.71.

Claimant is entitled to 23.57 weeks of temporary total disability compensation at the rate of $305.82 per week in the amount of $7,208.18, followed by 5.07 weeks of permanent partial disability compensation at the rate of $305.82 per week in the amount of $1,550.51 for a 5 percent loss of use of the foot, making a total award of $8,758.69. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Member concurs with the determination of the majority that claimant's average weekly wage should be calculated using the *Osmundson* analysis. However, the undersigned does not consider claimant's other jobs to be the same or very similar. Claimant delivered chair cushions for respondent. In claimant's other jobs, claimant delivered children, a cargo much more delicate than simple cushions.

This Board Member would exclude the other job earnings from claimant's Exhibit 1 of the regular hearing.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge